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Supreme Court of the United States

October Term 1950

No. 650

JOHN F. MARAGON

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IRVIN GOLDSTEIN
1406 G Street, N. W.
Washington, D. C.

EDWARD J. HAYES
1025 Connecticut Avenue, N. W.
Washington, D. C.

WILLIAM A. KEHOE, JR.
1331 G Street, N. W.
Washington, D. C.
Attorneys for Petitioner.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

John F. Maragon, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia (R. 105), affirming the judgment of the United States District Court for the District of Columbia convicting him of two counts of perjury in violation of Section 2501 of Title 22 of the District of Columbia Code, 1940 ed., as amended. Judgment was entered in the District Court on May 2, 1950 (R. 9A) and petitioner was sentenced to serve from eight to twenty-four months on each count, the sentences to run concurrently.

OPINIONS BELOW

The opinion of the Court below is contained in the record at page 103. This opinion is not as yet reported. There was no opinion in the District Court.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia were entered October 23, 1950. (R. 103-105). Petition for Rehearing was denied March 2, 1951 (R. 117). The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254. See also Rule 37 of the Federal Rules of Criminal Procedure and Rule 38 of the Rules of this Court.

In his Petition for Rehearing in the Court below, Petitioner prayed that the Petition be considered by the Court sitting *in banc* pursuant to the provisions of Section 46 of Title 28 of the United States Code. This action was taken in view of what appears to be a clear conflict of opinion on the questions presented to the Court below and because of the important bearing the decision of those questions would have on the proper administration of justice in the District of Columbia. The Petition for Rehearing was denied by order of Court entered on March 2, 1951. (R. 117).

QUESTIONS PRESENTED

1. Whether in a prosecution for perjury there was sufficient evidence to sustain a conviction where there was lacking the testimony of a single witness to contradict positively the sworn testimony of the accused.

2. Whether a consideration of the principles of *Screws* v. *United States,* 325 U. S. 91, 107, would indicate that where *wilfulness* is made an element of a statutory crime, it means something more than "knowingly" or "inten-

tionally", and as a constituent element of the crime must be submitted to the jury under appropriate instructions.

3. Whether, on the peculiar facts of this case, petitioner was denied the rights guaranteed him by the due process clause of the Fifth Amendment and the impartial jury guaranty of the Sixth Amendment by the fact that government employees sat as members of the Grand and Petit Juries.

4. Whether the Subcommittee of the Senate before which petitioner testified is a "competent tribunal" within the meaning of the perjury statute when it sought to elicit testimony in a hearing held in violation of Section 133 (f) of the Legislative Reorganization Act of 1946, 60 Stat. 831.

5. Whether a conviction of perjury can be sustained by the device of lifting statements from the record and giving them a meaning which the entire record will not sustain.

STATUTES INVOLVED

Sec. 22-2501 (6:131). Perjury.—Subornation of perjury.

Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a

judicial proceeding elsewhere, shall also be perjury within the meaning of this section. (Mar. 3, 1901, 31 Stat. 1329, ch. 854, Sec. 858.)

RULE XXV

STANDING COMMITTEES

(1) The following standing committees shall be appointed at the commencement of each Congress, with leave to report by bill or otherwise:

* * * *

(g) (1) Committee on Expenditures in the Executive Departments, to consist of thirteen Senators, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:

(A) Budget and accounting measures, other than appropriations.

(B) Reorganizations in the executive branch of the Government.

(2) Such committee shall have the duty of—

(A) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations to the Senate as it deems necessary or desirable in connection with the subject matter of such reports;

(B) studying the operation of Government activities at all levels with a view to determining its economy and efficiency;

(C) evaluating the effects of laws enacted to reorganize the legislative and executive branches of the Government;

(D) studying intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.

* * * *

(2) Each standing committee shall continue and have the power to act until their successors are appointed.

* * * *

STATEMENT

On July 28, 1949, petitioner testified under oath as a witness at an executive session of the Investigating Subcommittee of the Senate Committee on Expenditures in the Executive Departments that he did not have, either in the year 1945 or in the year 1946, any bank accounts other than accounts in the Union Trust Company and the Liberty National Bank of Washington, D. C. (R. 34A, 35A, 38A, 39A, 40A). He also testified at the same time that in 1946 he received income from the Verley Company and the State Department (R. 35A) and that he worked for the Verley Company only seven months in 1946 at which time he went to work for the State Department (R. 35A, 36A).[1] On January 3, 1950 an indictment was returned against him (R. 3A) charging in Count One that he committed the crime of perjury[2] when he testified as first above stated and in Count Three that he did when he testified as secondly above set forth. He was duly tried, the jury returning a verdict of guilty as to Counts One and Three and not guilty as to Count Two. The Trial Judge directed a judgment of acquittal on Count Four (R. 8A).

After proving the testimony given by petitioner before the Subcommittee, in support of Count One, the prosecution called one Sexauer, Assistant Cashier of the National Bank of Commerce, San Antonio, Texas, who testified that during the years 1945 and 1946 there was an account in the National Bank of Commerce in the name of one John H. Maragon (R. 14A, 15A). *The witness was unable to identify the petitioner as the depositor* (R. 15A). Mr. Sexauer also identified certain bank records relating

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[1] The testimony is set forth *infra* page 16.

[2] Title 22, Section 2501, Act of March 3, 1901, 31 Stat. 1329, ch. 854, 858, *infra* page 3.

to the account, including the signature card (Govt. Ex. 4A), ledger account sheets (Govt. Ex. 4), deposit tickets (Govt. Ex. 4B - 4W), and bank checks (Govt. Ex. 5A - 5J2) drawn upon the account (R. 15A, 16A, 20A).[3]

Carmine A. Bellino, an accountant employed by the Subcommittee, testified that on July 29, 1949, petitioner stated to him that he (petitioner) had an account in the National Bank of Commerce and that on the following day, July 30, 1949, petitioner gave to him sixty-two checks drawn on that account (Govt. Ex. 5A1-5G1, 5A2 - 5J2) (R. 17A - 19A).

Government Exhibits 31A through 31S were identified as treasurer's checks and drafts of the Union Trust Company purchased by petitioner and which indicated that they were subsequently deposited in the National Bank of Commerce (R. 60A - 65A).

It was stipulated that petitioner was an employee of the State Department from November 27, 1945 to March 14, 1946 (R. 52A).

Jeanette Schwartz, Assistant Treasurer of Albert Verley & Company testified that in May or June of 1945, petitioner became associated with that company to perform services which continued to August, 1946 (R. 52A, 53A). Petitioner's duties consisted of making contracts abroad and looking after the European affairs of Mr. Bennett, president of the company (R. 52A, 53A, 59A). Petitioner received $1000 per month for his services but no income tax was withheld as his compensation was regarded as a fee rather than a salary and his association with the Verley Company as a contractor rather than an employee (R. 59A, 60A).

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[3] It should be noted that no effort was made by the prosecution to identify any handwriting on the exhibits as being that of petitioner.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. The decision of the court below is in conflict with the previous decisions of this Court, e.g., *Hammer* v. *United States,* 271 U. S. 620 and *Weiler* v. *United States,* 323 U. S. 606, with its own previous decisions, e.g., *Cook* v. *United States,* 26 App. D. C., 427, 430, and with the decisions of other circuit courts of appeals, particularly the case of *United States* v. *Hiss* (C. C. A. 2d 1950) 185 F. (2d) 822.

2. The decision of the court below completely ignores and is in apparent conflict with the decision of this Court in the case of *Screws* v. *United States,* 325 U. S. 91, and is in apparent conflict with the decisions of other circuit courts of appeals.

Luse v. *United States,* (C. C. A. 9th) 49 F. (2d) 241, 246
Kuskulis v. *United States,* (C. C. A. 10th) 37 F. (2d) 241, 242
Smith v. *United States,* (C. C. A. 6th) 169 F. (2d) 118
Epstein v. *United States,* (C. C. A. 2d) 271 Fed. 282, 283

3. The decision of the court below did not consider whether, under the peculiar factual situation of this case, the petitioner was denied rights guaranteed him by the Fifth and Sixth Amendments. The question which the petitioner is seeking to have this Court decide is whether government employees are qualified to sit as grand and petit jurors in *every* criminal case which arises in the District of Columbia. The instant case is different from the recently decided cases of *Frazier* v. *United States,* 335 U. S. 497 and *Dennis* v. *United States,* 339 U. S. 162, in that the complainant here was a Subcommittee of the Senate Committee on Expenditures in the Executive Departments, which Committee is by law empowered to exert control directly over governmental employment.

4. In the case of *Christoffel* v. *United States,* 338 U. S. 84, this Court had occasion to determine whether a Committee of the House of Representatives was a "competent tribunal" within the meaning of the statute in issue here, Section 22-2501, D. C. Code, 1940 edition, and ruled on that question in light of the applicable rules and precedents of the House of Representatives. The instant case brings to the consideration of this Court the question of whether a Senatorial Subcommittee which interrogated the petitioner in executive session, in violation of one of the standing rules of the Senate, is a competent tribunal within the meaning of the same statute. Section 133 (f) of the Legislative Reorganization Act of 1946 provides that "all hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session." The record does not disclose that the executive session at which petitioner testified was ordered by a vote of either the full committee or the subcommittee.

Included within this question is the additional one of whether the petitioner was denied his fundamental right to a public trial when he was interrogated as *one accused* by a Senate Subcommittee conducting an inquisitorial hearing.

5. The decision of the court below completely ignores its holding in the case of *Meyers* v. *United States,* 84 U. S. App. D. C. 101, 171 F. (2d) 800. It is also inconsistent with the holdings of the following circuit courts of appeals:

Fotie v. *United States* (C. C. A. 8th) 137 F. (2d) 831, 841
Hart v. *United States,* (C. C. A. 9th) 131 F. (2d) 59
Galonos v. *United States,* (C. C. A. 6th) 49 F. (2d) 898
United States v. *Margolis,* (C. C. A. 3d) 138 F. (2d) 1002.

ARGUMENT

1.

In its opinion the Court below stated:

> "No witness testified specifically that appellant had the bank account in Texas. He therefore contends that the evidence against him was not sufficient to meet the requirement of the established rule relative to the quantity of testimony necessary for conviction of perjury. He says that the rule is that no person may be convicted of perjury unless the falsity of the statement made under oath is established by the testimony of two independent witnesses or by one witness and corroborating facts and circumstances. But that is not the rule." (R. 103, 104).

The conflict between this language of the court below is readily apparent when it is juxtaposed with the language of the Court of Appeals for the Second Circuit in the recently decided case of *United States* v. *Hiss,* 185 F. (2d) 822, wherein that Court stated at p. 824:

> "It is well established that the uncorroborated testimony under oath of one witness is not enough as a matter of law to prove perjury. *Hammer* v. *United States,* 271 U. S. 620, 46 S. Ct. 603, 70 L. Ed. 1118. There must be either two witnesses who testify that the accused violated his oath, or one witness to that and corroboration by other evidence which is believed by the jury and is found by it to substantiate the testimony of one witness. *Weiler* v. *United States,* 323 U. S. 606, 65 S. Ct. 548, 89 L. Ed. 495."

It was petitioner's position in the district court and in the Court of Appeals that the evidence offered the government under counts one and three was not sufficient to convict because no single witness positively contradicted the petitioner's sworn testimony. It is petitioner's position that the conviction cannot be sustained because no single witness testified in terms sufficient to

show the falsity of petitioner's oath within the requirements of the law as it is known in the federal courts. This is the rule which is sanctioned by this Court, see e.g., *Weiler* v. *United States,* 323 U. S. 606, and *Hammer* v. *United States,* 271 U. S. 620. It is the rule which was previously sanctioned by the Court below in the case of *Cook* v. *United States,* 26 App. D. C. 427, wherein it was stated, at page 430: "The charge (perjury) must be proved either by the testimony of two witnesses, *or by one* with proof of corroborating circumstances." (emphasis supplied). It has likewise been sanctioned almost universally by the other federal courts: *Allen* v. *United States,* 194 Fed. 664, *Clayton* v. *United States,* 284 Fed. 537; *United States* v. *Isaacson* (C. C. A. 2d) 59 F. (2d) 966, 967; *Smith* v. *United States,* (C. C. A. 6th) 169 F. (2d) 118, *Fraser* v. *United States* (C. C. A. 6th) 145 F. (2d) 145, 151; *United States* v. *Otto,* 54 F. (2d) 277.

Petitioner is cognizant that since this Court decided the case of *United States* v. *Wood,* 14 Pet. 430 (1840) under certain circumstances courts have held the rule, which he urges here, to be inapplicable. The *Wood* case holds that the "two witness" rule will not apply "where a person is charged with perjury, directly disproved by documentary or written testimony springing from himself." (14 Pet. at p. 441). But that holding and its ramifications are not apposite here. The *Wood* case is apposite only insofar as its application has tended to confuse and distort the application of the rule which petitioner urges herein. It should also be pointed out that this Court sanctioned the application of the rule adopted in the *Wood* case only in those cases where the jury had been fully and correctly instructed as to its meaning. See 14 Pet. 430 at 444. No such instruction was given in the present case, nor was any such instruction requested by either the petitioner or the government.

2.

In the trial court petitioner requested the following instructions: Number 10: "Before the jury can return a verdict of guilty, it must find from the evidence beyond a reasonable doubt that the alleged false statements were willfully and deliberately made. The word willfully as used implies not only knowledge, it means a statement made with the deliberate intent to deceive."

Number 11: "Perjury can only be imputed upon full knowledge of the falsity and cannot be predicated where willfulness, corruption and malice are not manifest." The trial court refused to give these requested instructions (R. 88A, 101) and, on this point, instructed the jury in the following words: "Perjury is simply the giving of false testimony under oath, testimony that a party does not believe to be true. If he testified before a competent tribunal as to a fact which is false, and he does not believe it to be true, then that would be perjury." (R. 81A). Concerning this instruction the court below held: "We think the instruction sufficient. The court did not in terms define the word 'wilfully', but it gave the clear and correct meaning of the requirement of the statute. While, as we have said before, 'wilfully' in a criminal statute may have any one of a number of meanings, we think it is clear that in the perjury statute it means 'knowingly' or 'intentionally'." (R. 104) (citations in footnotes omitted).

In the case of *Screws* v. *United States*, 325 U. S. 91, this Court had before it the question of the constitutionality of another criminal statute wherein "wilfulness" was also made an element of the crime. In the *Screws* case this Court held that where *wilfulness* is " 'used in a criminal statute it generally means an act done with a bad purpose.' . . . In that event something more is required than the doing of the act proscribed by the statute. . . . An evil motive to accomplish that which the

statute condemns becomes a constituent element of the crime." 325 U. S. at 107. This Court further held: "Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

It is readily apparent that the court below ignored the holding of this Court in the *Screws* case. By its opinion the court below has attempted to *legislate* out of the perjury statute one of its statutory, and common law, elements. In a long line of decisions other federal courts have long held that willfulness as used in the perjury statute means something more than "knowingly" or "intentionally" as was determined for the first time by the court below in the instant case. In the case of *United States* v. *Smith*, D. C. Oregon 1870 1 Sawyer 277, 298, the court held that conviction of perjury could not be sustained unless the falsity of the oath could be "attributable to a corrupt intent." To the same effect is *Epstein* v. *United States* (C. C. A. 2d) 271 Fed. 282, 283; *Kuskulis* v. *United States* (C. C. A. 10th) 37 F. (2d) 241, 242, and *Luse* v. *United States* (C. C. A. 9th) 49 F. (2d) 241, 246. In *Smith* v. *United States* (C. C. A. 6th) 169 F. (2d) 118, the court held that it must be proven beyond a reasonable doubt that the false oath was made "for the purpose of defrauding and deceiving."

In light of this Court's decision in the *Screws* case and the decisions of the other federal courts, the opinion of the court below is untenable as a matter of law. It cannot be accepted as being a definitive statement of the law, and in its attempted future application can only serve to confuse until the matter is finally and correctly determined by this Court. The petitioner feels that the obviousness of the harm which the opinion of the court below can cause in other causes, similar to this, arising under the District of Columbia perjury statute, if the

opinion is allowed to stand as a decisis of the law, makes this case a proper one for consideration by this Court.

3.

After his arraignment but prior to trial petitioner moved the district court to dismiss the indictment on the ground, among others, that fourteen of the twenty-three members of the Grand Jury, which returned the indictment against him, were Government employees. (R. 6A - 8A). During the impanelling of the petit jury and after exhausting his peremptory challenges, petitioner challenged for cause three of the petit jurors, all employed by the United States. (R. 10A, 98A). The challenges were overruled (R. 10A, 11A).

Petitioner was charged and tried for violating his oath in testifying before the Subcommittee on Investigations of the Senate Committee on Expenditures in the Executive Departments (R. 3A). Among others, the functions of this Committee were to consider and make recommendations to the Senate upon matters relating to budget, governmental reorganization in the Executive Departments and Governmental operation with a view to determining its economy and efficiency. Section 102 of the Legislative Reorganization Act of 1946, 60 Stat. 758, 816.[4] The executive departments in which the three challenged petit jurors were employed came within the purview of this Committee. The power of this Committee over employees in the executive departments is manifest and direct; it is empowered by law to exercise control directly over governmental employment. With the power and the duty which it has to make recommendations it can be said that the hands of this Committee were upon the string of the purse from which the government-employee juror receives his pay. Moreover this Subcommittee did

[4] *Infra*, page 4.

not sit serene and aloof from the trial of this case. The participation was active: the chairman of the Subcommittee and the chief counsel and members of the Subcommittee's staff testified as witnesses (R. 11A, 17A, 68A) to such an extent that the Subcommittee could in the fullest sense be identified as the complaining witness.

It may be that the seed of bias and partiality lay dormant in the government-employed jurors' minds at the time they took their oaths. But it must be readily apparent that such seed, no matter how dormant, would germinate and pervade their thinking when the full scope of the subcommittee's functions and duties was spread before them during the course of the trial. That an implication of bias could be thought to be present in the trial below denies to petitioner that right to an impartial jury which was guaranteed him by the Sixth Amendment.

Petitioner is fully cognizant that this Court has recently ruled in the cases of *Frazier* v. *United States,* 335 U. S. 497 and *Dennis* v. *United States,* 339 U. S. 162, on points similar to the one which is raised here. However, it is not petitioner's position before this Court that the jurors are disqualified because they are government employees; nor is it his position that these jurors must be deemed biased merely because of their government employment. It is petitioner's position that, under the peculiar aspects of this case and the parties involved, government employees sitting as members of either the grand or petit juries are not and could not be "impartial jurors" within the meaning of the Sixth Amendment.

Rule 6 of the Federal Rules of Criminal Procedure providing that an indictment shall not be dismissed for disqualification of some of the grand jurors if twelve or more qualified jurors concurred in the finding is not applicable. If the fourteen grand jurors are disqualified, as they must be, there are not remaining a sufficient number to find an indictment.

4.

The *sine qua non* to criminal perjury is that the alleged false testimony be given before a *competent tribunal.* Sec. 22-2501, D. C. Code, 1940 edition. In *Christoffel* v. *United States,* 338 U. S. 84, this Court determined that a committee of the House of Representatives was not a competent tribunal where such committee took testimony in a session held in violation of the applicable rules and precedents of the House.

Petitioner was charged with testifying falsely before a Senate Subcommittee of the Eighty-first Congress. (R. 3A). His testimony was elicited before that Subcommittee sitting in Executive Session (R. 20A). It is petitioner's contention that such subcommittee was not a competent tribunal within the perjury statute at the time it received this testimony because the subcommittee was at that time holding a session in violation of one of the standing rules of the Senate.

Section 133 (f) of the Legislative Reorganization Act of 1946, 60 Stat. 753, 831 provides that:

> "All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."

The hearing here involved was not one "for marking up bills" or "for voting." It was called for the sole purpose of having petitioner testify. No evidence was offered by the prosecution to establish that this subcommittee was authorized to hold an executive session to interrogate petitioner or any other witness. The question before this Court in the *Christoffel* case, *supra,* was whether the rules which the House had established had been followed; the question presented here is whether the rules established by the Senate have been followed.

During the trial the prosecution did introduce evidence of the Minutes of the Meeting of the Committee on Expenditures in the Executive Departments (R. 93A) wherein that Committee's Subcommittee on Investigations was authorized to hold executive sessions "whenever it is deemed advisable." (R. 95A). It should be noted, however, that this action was taken during the 80th Congress pursuant to a Resolution of the 80th Congress, and that the Petitioner testified before a Subcommittee of the 81st Congress. It should also be noted that there had been a change of membership of the Committee and Subcommittee during these two Congresses.

In light of the many inquisitorial hearings and investigations being conducted by congressional committees, and the criminal prosecutions which have arisen and are arising from them, it is felt that this is an extremely important question which calls for an opinion by this Court. It is a question which can be vexatious both to courts and lawyers, and an opinion by this Court is necessary for the future guidance of the trial courts in similar cases.

5.

The pertinent portion of count three of the indictment against petitioner alleges: "John F. Maragon wilfully and contrary to his oath stated the material matter that when he took employment with the State Department on a mission to Greece he was not in the employ of anybody else and had already discontinued his employment with Albert Verley & Company of Chicago, Illinois. . . ." (R. 5A). The most careful perusal of the stenographic transcript of petitioner's testimony before the Senate Subcommittee shows that this charge is based on the following questions and answers:

> "Mr. Rogers. Did you have any income from anyone except the Verley Company?

Mr. Maragon. The Verley Company and I believe the State Department.

Senator Mundt. What was the income from the State Department? Were you working for the State Department then?

Mr. Maragon. Senator, when the mission was organized to go to Greece to supervise the elections there, the State Department wanted about a dozen citizens of Greek extraction who spoke the language to act as interpreters and otherwise. I was one of twelve who was accepted by the State Department and went over there to act as such.

Senator Mundt. This was from a salary or expense?

Mr. Maragon. Yes, sir; I was not in the employ of anybody else then.

Mr. Rogers. According to your income tax return for 1946, you report $6,000 from Albert Verley Company; is that correct?

Mr. Maragon. That is correct.

Mr. Rogers. You previously testified you were to get $1,000 a month. Was that reduced in 1946?

Mr. Maragon. In 1946, I went to work seven months because Drew Pearson began his first articles against me and Mr. Bennett found it embarrassing to continue me.

Mr. Rogers. So your services were discontinued?

Mr. Maragon. That is right.

Mr. Rogers. Is that the time you went to work for the State Department?

Mr. Maragon. That is right.

(Italics supplied for emphasis)." (R. 35A, 36A).

In consideration of this point no question is raised but that petitioner was employed by the State Department from November 27, 1945, through March 14, 1946, and that he was employed, using that word in its full sense and meaning, by the Albert Verley Company from July, 1945 through August, 1946. The question that is presented is whether petitioner in testifying before the Subcommittee swore that this dual employment did not exist in such a clear and unambiguous manner as to constitute perjury.

In other portions of his testimony the petitioner clearly identified the time when he worked for the Albert Verley Company (R. 22A, 31A). His income tax return for the year 1945 and the year 1946 showed income from this Company (R. 22A, 23A). He clearly identified the occasion of his becoming employed by this Company in 1945 (R. 31A, 36A), and he clearly identified the time in 1946 when he discontinued his employment with that Company. With respect to employment by the State Department the petitioner clearly identified in his income tax return for 1946 that he had worked for the State Department (R. 35A). He clearly advised the Committee that he had gone on the Grady Mission to Greece to supervise the Greek elections. (R. 35A). He also clearly identified the fact that this mission to Greece commenced in the year 1945 and Mr. Rogers, the committee counsel, showed by his question (R. 35A) that he understood that petitioner was a member of the Grady Mission which went to Greece in 1945.

From a reading of the transcript it is clear that the first part of the accusations against petitioner contained in Count 3 is not made in response to any question and is actually an answer without meaning and which is lifted from the context of petitioner's testimony to form the basis of a criminal accusation against him. It is equally clear that the question and answer which forms the basis of the accusation contained in the second part of count 3 is confusing and served only to confuse the witness so as to give rise to a subsequent criminal prosecution. This device of lifting questions and answers out of their context for the purpose of instituting a criminal prosecution of perjury has been almost universally condemned by the courts. It was condemned by the court below in the case of *Meyers* v. *United States,* 84 U. S. App. D. C. 101, 107; 171 F. (2d) 800. It has likewise been condemned by other circuit courts of appeals in the following cases:

Fotie v. *United States* (C. C. A. 8th) 137 F. (2d) 831, 841
Hart v. *United States,* (C. C. A. 9th) 131 F. (2d) 59
Galonos v. *United States,* (C. C. A. 6th) 49 F. (2d) 898
United States v. *Margolis,* (C. C. A. 3d) 138 F. (2d) 1002.

The ocurt below completely ignored petitioner's argument and brief on this point and by so doing has impliedly overruled or ignored its own previous decisions and has impliedly overruled and ignored a rule of almost universal application in this country. Petitioner believes that this is a proper matter on which this Court should express an opinion. A definitive ruling on this point is made necessary by the ruling of the court below to the effect that the word "wilful" as used in the perjury statute means only "knowingly" or "intentionally". Without a clear cut delineation of the correct governing principle of law by this court, the perjury statute becomes a baited trap for the unwary who must take an oath under circumstances that are anything but friendly and be faced with the knowledge that any statement he makes may be subsequently isolated, taken from its context, and prove the foundation for a criminal charge. Petitioner submits that justice to him and the fulfillment of the duties and responsibilities of this Court require that this Court grant certiorari in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

IRVIN GOLDSTEIN
EDWARD J. HAYES
WILLIAM A. KEHOE, JR.
Attorneys for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 650

JOHN F. MARAGON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 103-104)[1] is reported at 187 F. 2d 79.

JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1950 (R. 105), and a rehearing was denied *en banc* on March 2, 1951 (R. 117). The petition for a writ of certiorari was filed on

[1] The symbol "R." refers to the printed joint appendix and "Tr." to the original stenographic transcript of record.

April 2, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence in a prosecution for perjury, consisting of testimony by a number of witnesses and numerous documents, is insufficient because no one witness testified directly as to all aspects of the false statements.

2. Whether the trial court properly instructed the jury as to the element of wilfulness in the crime as defined by the District of Columbia Code.

3. Whether, in the circumstances of this case, Government employees should have been disqualified as members of either the grand or petit juries.

4. Whether the subcommittee before which petitioner made the sworn statements was a "competent tribunal" within the meaning of the perjury section of the District of Columbia Code.

STATUTES INVOLVED

22 D. C. Code 2501 (1940) provides:

> *Perjury.—Subornation of Perjury.* Every person who, having taken an oath * * * before a competent tribunal, * * * in any case in which the law authorized such oath * * * to be administered, that he will testify * * * truly, * * * wilfully and contrary to such oath * * * states * * * any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury

> * * * shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. * * *

Section 133(f) of the Legislative Reorganization Act of 1946, 60 Stat. 831 provides:

> All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session.

Section 134(a) thereof provides:

> Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures * * * as it deems advisable. * * *

STATEMENT

Petitioner was found guilty under the first and third counts of a four-count indictment charging him with perjury before a Senate subcommittee in violation of the perjury section of the District of Columbia Code, 22 D.C. Code 2501 (1940). He was sentenced to imprisonment for eight months to two years on each of such counts, the sentences

to run concurrently (R. 9) On appeal to the Court of Appeals for the District of Columbia Circuit the conviction was affirmed (R. 105), and a rehearing was denied *en banc* (R. 117).

The perjured statements were made in the course of sworn testimony by petitioner before the Subcommittee on Senate Investigations of the Committee on Expenditures in the Executive Departments, which was then occupied in an investigation of so-called "five percenters" (*i.e.,* commission agents who deal with the Government on behalf of principals) (R. 11-12). The counts under which petitioner was found guilty charged him with wilfully and falsely making the following material statements, not believing them to be true: that he did not have, either in the year 1945 or 1946, any bank account except an account in the Union Trust Company of Washington, D. C.; and that when he obtained employment with the State Department on a mission to Greece, he was not in the employ of anybody else and had already discontinued his employment with Albert Verley and Company of Chicago, Illinois (R. 4-5).

A. *The Evidence as to Count One.* Petitioner appeared on July 28, 1949, and after being sworn (R. 20-21), was questioned as to his occupation and sources of income during 1945 and the years following. With reference to the year 1945 he was asked by the subcommittee counsel, "Did you have any bank accounts at that time?" He answered, "I had a bank account with the Union Trust," and

stated that this bank balance "was pretty close to $4,000, something like that" (R. 25). The following questions and answers appear in the transcript of the proceeding (Gov. Ex. 2):

> Mr. ROGERS: Did you have any other bank account in 1945?
>
> Mr. MARAGON: No, sir.
>
> Mr. ROGERS: Just the Union Trust Company?
>
> Mr. MARAGON: That's right. [R. 34.]
>
> * * * * *
>
> Mr. ROGERS: And you had no other bank account at all except the Union Trust Company in 1945; is that correct?
>
> Mr. MARAGON: Yes, sir. [R. 34-35.]
>
> * * * * *
>
> Mr. ROGERS: Now let's go to 1946. Did you have the same bank account in 1946?
>
> Mr. MARAGON: Yes, sir.
>
> Mr. ROGERS: Did you have any additional bank accounts in 1946?
>
> Mr. MARAGON: Yes, sir. [R. 35.]
>
> * * * * *
>
> Mr. ROGERS: Did you have any other bank account in 1946?
>
> Mr. MARAGON: No.
>
> Mr. ROGERS: Only in the Union Trust Company?
>
> Mr. MARAGON: That's right. [R. 38.]
>
> * * * * *

Mr. ROGERS: In 1946, did you have any other bank accounts except in the Union Trust Company?

Mr. MARAGON: No other account. [R. 39.] [2]

During the trial Senator Hoey testified that he heard petitioner state under oath that he had just the one bank account (R. 12). Mr. Sexauer, assistant cashier of the National Bank of Commerce, San Antonio, Texas, identified a bank signature card bearing petitioner's name as being one given him at that bank by an individual who had signed it, though he could not positively identify petitioner in the court room (R. 14-16, Gov. Ex. 4a). He also identified as part of the same San Antonio account, ledger sheets [3] and a large number of deposit slips.[4] A staff member of the Subcommittee, Bellino, identified 62 bank checks given to him by petitioner two days after the subcommittee hearing, and Sexauer identified them as clearing through the accounts of the San Antonio bank. These checks correspond to the withdrawal notations on the ledger sheets (R. 16-20). Witness Bahlman of Union Trust in Washington, D. C. identified petitioner as the purchaser of drafts and

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[2] Later, after testifying that following 1946 he opened another account at the Liberty National Bank, he testified that he had no other bank account at any time except with Union Trust and Liberty National (R. 39-40).

[3] These two ledger sheets (Gov. Ex. 4) indicate this account was opened July 29, 1943 and closed March 15, 1947, and that large deposits and withdrawals were made in 1945 and 1946, the balance at the end of 1946 being over $19,000.

[4] Gov. Ex. 4B-4W.

treasurer's checks for cash, some of which were indorsed for deposit to the National Bank of Commerce, San Antonio, Texas (R. 60-65, Gov. Ex. 31A-31S). The testimony of Bray (Tr. 550-555) and Wainwright (Tr. 574-575), both of whom identified petitioner, substantiates petitioner's custom of buying drafts for cash from Union Trust and depositing them by mail in the San Antonio account. The day after the subcommittee hearing, when petitioner was told that there were indications that he had an account in the National Bank of Commerce in San Antonio under the name of "J. H. Maragon," he admitted that such was the fact (R. 68-73).[5]

B. *The Evidence as to Count Three.* Petitioner was also questioned by the Subcommittee as to his employment. He testified that in July 1945 Mr. Bennett, president of the Verley Company, offered to "employ" him to go to Europe to reestablish his "essential oil"[6] business in Europe (R. 31). He thereupon resigned his position with the Baltimore and Ohio Railroad (R. 27, 31); accepted the position "as full-time employee at $1,000 a month or $12,000 a year" beginning in July 1945 (R. 31); and proceeded to Europe with all expenses paid by Verley (R. 31-32). As to 1945, he testified that his

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[5] On this occasion he contended that he opened the account while with the B & O Railroad by depositing therein an inheritance of his wife, and that he used that account from then on to deposit funds turned over to him by tourists (R. 73).

[6] Used for the manufacture of perfume (R. 58).

only employment was with the B & O Railroad and Verley (R. 32). On being asked if he had any income in 1946 from anyone except the Verley Company, he stated that he had income also from the State Department when he went with the Grady Mission to Greece (R. 35). In response to a question as to whether his State Department income was from a salary or expenses, he answered (R. 36): "Yes, sir; I was not in the employ of anybody else then." He admitted, however, receiving $6,000 compensation from the Verley Company in 1946 (R. 23, 36) and described a trip he took for them to Europe in 1946 on company business for which he got an additional $1,000 bonus and all his expenses paid by the Verley Company (R. 36-37). He also stated that in 1946 he worked seven months for the Verley Company, but because of press attacks by a columnist named Pearson, his services were discontinued with Verley, and that he then went to work for the State Department (R. 36).[7]

On the trial, witness Sakell of the State Department identified petitioner as a member of the so-called Grady Mission to Greece which left on January 27, 1946, and came back on May 1, 1946 (R. 51). State Department records showed that petitioner was employed by the State Department from November 28, 1945 to March 14, 1946 (Tr. 478-481,

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[7] Later he stated that his services with the Verley Company were terminated "sometime during the middle of the year" 1946 (R. 39).

Gov. Ex. 21), a fact admitted by petitioner in open court (R. 51-52). Jeanette Schwartz of the Verley Company testified that in July 1945, petitioner took over duties for the president of that company who had become ill, and he remained with that company until August of 1946. She identified a letter dated October 10, 1945, addressed to Maragon from the Verley Company enclosing checks, notifying him he would get a $1,000 check each month, and asking him if he wanted to charge these checks to regular salary (R. 55-56, Gov. Ex. 24). A letter from petitioner to Bennett of the Verley Company dated September 1, 1946, was offered in evidence indicating that petitioner had been associated with that company for the preceding fifteen months but was then leaving its employ (R. 57, Gov. Ex. 25).

Bellino, the accountant for the Subcommittee, testified that the day after the hearing, petitioner stated that when he was in Greece on the Government payroll, he had been approached by private interests to transact business but he had not done so. Bellino first discovered the fact of petitioner's dual employment about August 12, 1949, when, in examining the Verley Company records after the hearing, he noted that petitioner had been employed by that company during the period from November 1945 to March 1946, when he was also on the State Department payroll, and that petitioner had charged a similar trip to both his State De-

partment and Verley expense accounts during this period (R. 66-67).

Petitioner did not testify and produced only one witness, Senator Mundt of the Subcommittee, who testified that, prior to the Subcommittee hearing, petitioner had requested an opportunity to refute certain press articles written by Pearson (R. 78-79).

ARGUMENT

1. Petitioner argues that as a matter of law the evidence is insufficient to meet the quantitative rule of evidence applied in perjury prosecutions as "no single witness testified in terms sufficient to show the falsity of petitioner's oath" (Pet. 9-10). This argument erroneously assumes that, under the perjury rule, at least one witness must directly testify to all aspects of the falsity regardless of how many witnesses testify or how much documentary evidence is adduced.

As the Court of Appeals held, however, the true rule stated by this Court in *Hammer* v. *United States,* 271 U.S. 620, 626, and repeated in *Weiler* v. *United States,* 323 U.S. 606, 607, is merely that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury." The rationale of this rule, as stated in the *Weiler* decision (p. 609), is that "A conviction for perjury ought not to rest entirely upon 'an oath against an oath'." There is no requirement that at least one

witness must independently establish all the facts, regardless of the other testimony. The testimony of several witnesses, testifying to different facts, is often mutually corroborative of the ultimate fact to be established. *United States* v. *Palese,* 133 F. 2d 600, 602 (C.A. 3). This Court has so recognized even with respect to treason cases which are subject to more stringent rules of proof than perjury (see *Haupt* v. *United States,* 330 U.S. 631, 640). Indeed, it has long been established that perjury may be proved without a witness at all, if there is documentary evidence emanating from the perjurer, as such writings may be better evidence of falsity than any amount of oral testimony. *Hammer* v. *United States, supra* (271 U.S. 620, 627); *United States* v. *Wood,* 14 Pet. 430. Manifestly, therefore, the rule as to quantum of proof in perjury cases requires no more than that there be weightier proof than the testimony of a single witness.[8]

Here, as the court below pointed out, the Government did not rest upon the uncorroborated testimony of one witness or on documentary evidence alone, but upon the testimony of a number of witnesses and "an accumulation of uncontroverted documentary evidence, supplemented by identification of appellant as a party to some of the docu-

[8] The quotation from *United States* v. *Hiss,* 185 F. 2d 822 (C. A. 2), on which petitioner relies to establish a conflict with the decision below (Pet. 9), is merely a restatement of the established perjury rule. The court was not addressing itself to the implications which petitioner tries to read into that rule.

ments, and upon statements by appellant" (R. 104). The evidence was clearly sufficient to meet the perjury rule and to support the verdict.

2. Petitioner also objects (Pet. 7, 11-13) to the trial court's failure to instruct the jury that the false statement must be made "wilfully," as required by 22 D.C. Code 2501 (1940) (*supra*, p. 2). The court instructed as follows (R. 81):

> Perjury is simply the giving of false testimony under oath, *testimony that a party does not believe to be true.* If he testifies before a competent tribunal as to a fact which is false, *and he does not believe it to be true,* then that would be perjury. [Italics supplied.]

It is clear that this instruction adequately embraced the elements of the crime (R. 88-89).

The Court of Appeals has interpreted the word "wilfully," as used in the District of Columbia perjury section, to mean "knowingly" or "intentionally" (R. 104), a meaning obviously covered by the above italicized portion of the charge. Although that word may vary in meaning depending on the particular statutory context,[9] the meaning given by the Court of Appeals finds ample support in cases dealing with the federal perjury section[10] (*United States* v. *Norris*, 300 U.S. 564, 571, 574; *United States* v. *Seavey*, 180 F. 2d 837 (C.A. 3), certiorari denied, 339 U.S. 979; *Fotie* v. *United States*,

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[9] See *Screws* v. *United States*, 325 U. S. 91, 101 (opinion of Douglas, J.).

[10] 18 U. S. C. 1621.

137 F. 2d 831, 840 (C.A. 8); *United States* v. *Otto*, 54 F. 2d 277, 279 (C.A. 2)), and also under the District of Columbia perjury section,[11] *Pyle* v. *United States*, 156 F. 2d 852, 856 (C.A. D.C.).

Petitioner cites cases which he contends are in conflict with the decision below.[12] Those cases, however, use the word "wilfully" in the same sense as the word "deliberate" is used in the definition of perjury given by the *Norris* case, *supra* (300 U.S. at p. 574): a "deliberate material falsification under oath." The necessity of finding wilfulness is to insure that the jury will not consider the truth or falsity of defendant's sworn statement without regard to defendant's knowledge of its falsity. Since, in this case, under the judge's charge, the jury was required to find not only that petitioner's sworn statement was false, but that petitioner did not "believe it to be true", the charge correctly defined this element of the crime.

3. Petitioner objects to the presence of Government employees on both the grand and petit juries (Pet. 7, 13-14). The objection to their presence on the grand jury was raised on motion to dismiss the indictment which was supported by an affidavit of petitioner's counsel stating merely that there were fourteen Government employees on the grand jury

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[11] 22 D. C. Code 2501 (1940), *supra*, pp. 2-3.

[12] *Smith* v. *United States*, 169 F. 2d 118 (C. A. 6); *Luse* v. *United States*, 49 F. 2d 241, 246 (C. A. 9); *Kuskulis* v. *United States*, 37 F. 2d 241, 242 (C. A. 10); *Epstein* v. *United States*, 271 Fed. 282, 283 (C. A. 2).

(R. 6-7). No reason was advanced to show how this was prejudicial to petitioner. The District Court denied the motion (R. 8). On the *voir dire* petitioner's counsel, after exhausting his peremptory challenges, challenged for cause four Government-employed jurors on the ground of "implied bias" since the case involved witnesses who were "members and employees of a subcommittee of the Senate Committee on Expenditures and Budget." The court overruled the challenges (R. 10-11).

This Court has on several occasions upheld the right of Government employees to serve as jurors in criminal prosecutions. *United States* v. *Wood,* 299 U.S. 123; *Frazier* v. *United States,* 335 U.S. 497; *Dennis* v. *United States,* 339 U.S. 162. In the *Dennis* case, involving the trial of the General Secretary of the Communist Party for willfully failing to appear before the Committee on Un-American Activities of the House of Representatives, the defendant claimed implied bias on the ground that a vote for acquittal might be interpreted as "sympathetic association" with communism which would subject the government juror to discharge on loyalty grounds. In upholding the right of government employees to act as jurors in that case, this Court said (339 U.S. at pp. 171-172):

> We think the rule in *Wood* and *Frazier* should be uniformly applied. A holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible. The Act [11 D.C. Code

> 1420 (1940)] makes no exception for distinctive circumstances.
>
> * * * * *
>
> In this case, no more than the trial court can we without injustice take judicial notice of a miasma of fear to which Government employees are claimed to be peculiarly vulnerable—and from which other citizens are by implication immune. Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors, which duty this same Government has imposed upon them.

Petitioner makes no claim of actual bias in his case on the part of the jurors. He argues that, as the function of the parent committee was to consider and make recommendations to the Senate upon matters relating to budget, governmental reorganization, and governmental operation, the Government jurors could not render a verdict free from bias at a trial where a subcommittee member and employees were witnesses (Pet. 13-14).[13] This is patently a more tenuous argument than was advanced in the *Dennis* and *Frazier* cases, and is overruled by the holding of those cases.

4. Petitioner further contends (Pet. 15-16) that

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[13] One Senator from the subcommittee (R. 11) and two staff members (R. 17, 68) testified at the trial.

the Subcommittee on Senate Investigations was not a "competent tribunal" at the time of petitioner's sworn testimony before that body because it was sitting in executive session contrary to Section 133(f) of the Legislative Reorganization Act of 1946 (*supra,* p. 3). He argues that although Section 133(f) permits the majority of a committee to vote executive sessions, and although the parent Committee on Expenditures in the Executive Departments had authorized the subcommittee to hold executive sessions "whenever it is deemed advisable" (R. 93-95), such authority given during the 80th Congress did not obtain at the time of the subcommittee investigation during the 81st Congress.

The subcommittee was established by action of the full standing Committee on February 26, 1948. Besides being empowered to proceed with any investigation within the jurisdiction of the full committee, it was given the power "to hold executive sessions rather frequently for the purpose of taking testimony of, or conferring with, Government officials and others, in order to determine the advisability of holding public hearings" (R. 93-95, Gov. Ex. 7).

The creation of this subcommittee followed the promulgation of Senate Resolution 189, 80th Congress, 2d session (R. 96-97, Gov. Exs. 8, 9).[14] The

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[14] This resolution provided that the Committee "or any duly authorized subcommittee thereof" could make certain expendi-

authority given by this Senate Resolution was extended by Senate Resolution 259, 80th Congress, 2d session, to February 15, 1949 (R. 98, Gov. Ex. 10). On January 19, 1949, at an executive meeting of the parent Committee, the personnel of the subcommittee were approved, including the appointment of Senator Hoey as Chairman (R. 92, Gov. Ex. 3). On February 10, 1949, the power given the Committee and "any duly authorized subcommittee thereof" by Senate Resolution 189 of the 80th Congress was again extended by Senate Resolution 52 of the 81st Congress to include the period beginning February 16, 1949, and ending on February 15, 1950 (R. 91, Gov. Ex. 1). Petitioner testified on July 28, 1949 (R. 20).

Manifestly, the resolution of the 81st Congress continued the life of the Committee from the 80th Congress into the 81st Congress. The fact that there was a change in the membership of the Committee (a standing committee) and its subcommittee does not affect the continuity of the organization and powers of the subcommittee. The authority of the subcommittee to hold executive sessions, conferred by action of the full standing Committee on February 26, 1948, during the 80th

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tures and employ personnel to carry out the duty imposed on the Committee by subsection (g) (2) (B) of Rule XXV of the Standing Rules of the Senate, *i. e.*, "Studying the operation of Government activities at all levels with a view to determining its economy and efficiency."

Congress was therefore continued into the 81st Congress.[15]

CONCLUSION

The decision below is correct, and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

MAY 1951.

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[15] A final contention is made that the statements alleged as the basis for the charge under count three were lifted out of context (Pet. 16-19). Since petitioner was given concurrent sentences on both counts, the separate argument addressed to one count alone is immaterial. In any event, resort to the context, including the uncontroverted evidence of dual employment, refutes such a contention, and reinforces the conclusion that the statements were false and that petitioner knew them to be false. This contention goes to the weight of the evidence as the jury considered the entire transcript of the subcommittee hearing (R. 20-50, Gov. Ex. 2) as well as the rest of the evidence.

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